STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

DOUG BROOKS, Appellant, and STATE OF IOWA (IOWA WORKFORCE DEVELOPMENT), Appellee.	CASE NO. 100778 DECISION ON REVIEW

This case is before the Public Employment Relations Board (PERB or Board) on Appellee State of Iowa's petition for review of a proposed decision and order issued by an administrative law judge (ALJ) following an evidentiary hearing on Brooks' Iowa Code section 8A.415 disciplinary action appeal. Brooks was employed in a supervisory role as a workforce development manager in the "Promise Jobs" program at Iowa Workforce Development. Brooks hired IV in December 2015 and she began her employment on January 15, 2016. IV has a visual disability and required accommodations to her workspace and technology due to that disability. Brooks was terminated pursuant to an IWD work rule and the EEO/AA/ADA policy on March 31, 2016, for his alleged discrimination of IV on the basis of her disability.

In her proposed decision issued December 29, 2017, the ALJ concluded that the State had not established just cause for its termination of Brooks' employment. The ALJ ordered Brooks' reinstatement to his former position or a substantially similar position with back pay and restoration of benefits.

Counsel for the parties, Henry Widen for the State and Mark Hedberg for Brooks, telephonically presented oral arguments to the Board on March 29, 2018. Prior to the oral arguments, the State filed a brief outlining its position and Brooks relied on the brief submitted after the evidentiary hearing.

Brooks contends that he did not discriminate against IV and the State did not establish just cause for termination. Brooks also disputes the ALJ's factual finding that Brooks said he would not have hired IV if he had known he would have to remove an employee from an office space to accommodate IV's disability. Brooks agrees with the ALJ's conclusions of law and determination that the State failed to establish just cause. The State, however, agrees with the ALJ's findings of fact, but disputes the ALJ's conclusions of law. The State contends that Brooks' comments at a January 21 meeting with his supervisor, Landess, in conjunction with Brooks' delay in accommodating IV's workspace situation constitute discrimination and provide just cause to terminate his employment. During arguments the State acknowledged that any delay in accommodating IV's technology needs was outside of Brooks' control and thus the State argues on petition to the Board that a delay in technology accommodation no longer forms the basis for the claim that Brooks discriminated against IV on the basis of her disability. The State relies on Brooks' statements to Landess about IV's workspace accommodations in conjunction with what the State deems as an unreasonable delay in

providing the workspace accommodations as the basis for the discrimination allegation.

On board review the board has the same power it would have had if the board had initially made the determination except that the board may limit the issues with notice to the parties or by rule. The board "may reverse or modify any finding of fact if a preponderance of the evidence will support a determination to reverse or modify such a finding, or may reverse or modify any conclusion of law that the agency finds to be in error." Iowa Code § 17A.15(3). Pursuant to PERB rules 621—11.8 and 621—9.5 on this petition for review, we have utilized the record as submitted to the ALJ.

After a review of the record, as well as the parties' briefs and oral arguments, we adopt the ALJ's findings of fact with one exception and we adopt the ALJ's conclusions of law with additional grounds. We conclude the State did not establish just cause for termination of Brooks' employment.

FINDINGS OF FACT

The ALJ's findings of fact, as set forth in the proposed decision and order attached as "Appendix A," are fully supported by the record, and we adopt the ALJ's findings of fact except as otherwise provided. Brooks disagrees with the ALJ's finding that Brooks said that if he had known an employee would be required to vacate an office, he would not have hired IV. Although we would not have made the same finding as the ALJ,

this fact would not ultimately change our determination that the State lacked just cause to terminate Brooks' employment.

CONCLUSIONS OF LAW

After consideration of the State's arguments and review of the ALJ's conclusions, we find the ALJ correctly analyzed the totality of circumstances to reach the determination that the State did not establish just cause to support the termination of Brooks' employment. Except as otherwise noted, we agree with the ALJ's conclusions as set forth in the attached appendix and adopt them as our own.

We agree with the ALJ's conclusion that the State did not establish just cause for termination after considering the totality of the circumstances, especially whether the employee was given forewarning or had knowledge of the employer's rules and expected conduct and whether sufficient evidence or proof of the employee's guilt of the offense was established. *See Hoffman and State of Iowa (Dep't of Transp.)*, 93-MA-21, at 22.

The State bases its determination that Brooks violated the discrimination policy and the IWD work rule on Brooks' alleged unreasonable delay in placing IV in an office along with statements Brooks made to his supervisor, Landess, about the recommendation that IV be placed in an office to accommodate her disability due to the lighting issues in the office.

We find Brooks' delay in placing IV in an office was not unreasonable, and Brooks was not on notice that his failure to place IV in an office while she was in training would be a violation of IWD work rules or the State's ADA policy.

Prior to IV's first day at IWD, Diana DeHeer, a management analyst with IWD, IV, and Brooks, along with other designated staff conducted a workspace survey. In that survey, IV noted that the lighting would be an issue due to her sensitivity to light. In that discussion, IV made multiple suggestions to address this lighting concern, including raising the cubicle walls and turning off overhead lights. These suggestions were discussed in the IWD/430 Office Ergonomics Evaluation Form (Ergo Report). In that report, DeHeer recommended that IV be placed in an office because the lighting in the area was within OSHA standards and raising the walls of the cubicles did not fit within the "new vision for the agency" to refrain from having taller walls on the floor.

The December 22 workspace survey and the January 15 Ergo Report put Brooks on notice that IV required workspace accommodations. However, in both the discussion on December 22 and the Ergo Report, multiple options were considered to accommodate IV's lighting sensitivity so Brooks was not on notice about how management intended to accommodate IV's lighting sensitivity.

The State claims that Brooks should have known that he was required to implement the Ergo Report's recommendation that IV be

placed in an office due to the mandatory language of the report. But, the report specifically says that placement of IV in an office was a "recommendation." Further, in communications with IV, DeHeer stated that her report was a recommendation and IV would have to follow up with management for the final determination. The record does not contain evidence that management had reached a determination on the appropriate workspace accommodation until January 21, when Landess and Brooks had a discussion about IV's accommodations.

Through the January 21 closed-door meeting between Brooks and his supervisor Landess, it became clear that management's determination was that IV's light sensitivity was to be accommodated by moving her into an office. The timing of the move was not discussed at that meeting. Nonetheless, at that point, Brooks should have known that he was required to move IV into an office.

However, in a follow-up meeting that occurred within days of the January 21 meeting, Brooks and Landess discussed when the office move would occur and Landess agreed that IV did not need to be in an office until she was working with clients. IV was still in training at the time and remained in training at least through February 5 when she confirmed that she was still in training during the investigatory interview.

IV was ultimately placed in an office by Landess when the opportunity conveniently presented itself. On February 5, the first day of

Brooks' vacation, one of IV's coworkers approached Landess and explained that she was going to transfer and she offered her office to IV. IV was moved to the office on February 12, the last day of Brooks' vacation.

The State maintains that Brooks discriminated against IV by unreasonably delaying moving IV to an office. At no point do we see this delay as unreasonable. Prior to January 21, Brooks was unaware that IWD management would not support alternative solutions, such as raising the cubicle walls, for IV's lighting sensitivity. *See Peninsula Regional Medical Center v. Adkins*, 137 A.3d 211, 237-38 (Ct. App. MD 2016) (citing *Rehling v. City of Chicago*, 207 F.3d 1009, 1014 (7th Cir. 2000)) (stating that the employer must provide a reasonable accommodation and not necessarily the accommodation of the employee's choice). On January 21 in the meeting in which Brooks learned that IWD management expected IV's light sensitivity be accommodated by moving her into an office, Landess said "we need to make the accommodation happen." This directive from management does not demonstrate when the office accommodation needed to occur. Further, in a follow-up meeting with Landess, Brooks discussed the timing of IV's move into an office, and Landess agreed to delay moving IV into an office during training as the office waited on a phone installation. Brooks had a supervisor's approval in delaying the office accommodation.

Additionally, Brooks' supervisors Landess and Reha were aware of the Ergo Report and its recommendations and aware that IV was not in an office, and yet neither supervisor felt this delay in accommodation was a serious enough situation to step in and move IV into an office. Nonetheless, IWD did feel the delay was a serious enough situation to terminate Brooks' employment.

IV has a disability that required workspace accommodations. Those accommodations were made within twenty-one work days of her start date. Brooks was only in the office for fifteen of those days. Moving an employee into an office in less than a month is not an unreasonable delay. *See Jay v. Intermet Wagner Incorporated*, 233 F.3d 1014, 1017 (7th Cir. 2000) (finding a 20-month delay in accommodations that included reassignment was reasonable under the circumstances); *Logan v. Matveevskii*, 57 F. Supp. 3d 234, 271 (S.D. NY 2014) (stating that courts have found a request for reasonable accommodations to have been constructively denied after delays approximating four months, but stating the length of the delay is not the only factor for determining whether a denial of accommodation has occurred). Additionally, Brooks was given leeway to delay moving IV into an office after January 21 when his supervisor agreed to wait and check into the phone installation since IV was still in training and was not working with clients.

Further, as discussed in the ALJ's findings of fact and conclusions of law, Brooks worked on accommodating IV's technology needs prior to

her start date and throughout the 21 days that Brooks supervised her. His continuous work on her technology accommodations tends to demonstrate that his inaction on the office space accommodation was not due to a discriminatory intent.

We find that Brooks' alleged delay in providing IV with an office space as a workspace accommodation to her lighting sensitivity was not unreasonable. The State has not demonstrated that Brooks was on notice that this minor delay in moving IV to an office would constitute a violation of the IWD work rule or the ADA policy. Additionally, the delay at issue was minimal, and we do not find the State has shown with sufficient proof that Brooks was guilty of the IWD work rule or the ADA policy for his alleged delay in moving IV into an office.

The State alternatively contends that even if we do not find the delay in accommodations to be unreasonable, Brooks' comments in the meeting with Landess, his supervisor, on January 21 justify Brooks' termination. We disagree.

The ALJ found that Landess and Brooks had a closed-door meeting on January 21. When asked to identify the employee who would vacate the office to make the office space accommodation for IV, Brooks responded that it was "bullshit." Brooks went on to explain that the employees that worked hard for an office, which were allotted based on seniority, would be booted out for a new employee. The ALJ also found that Brooks stated if he had known that an employee would be required

to vacate an office, he would not have hired IV. Within the next few days, by January 25 at the latest, Landess and Brooks had a follow-up meeting in which Brooks said his comments on January 21 were in response to "a really bad day" when several staff members had come to him with complaints and he was venting to Landess. In this subsequent meeting Brooks identified the person that would vacate the office and Brooks and Landess discussed the timing of IV's move into an office.

We would not have made the same finding as the ALJ regarding Brooks' statement that he would not have hired IV had he known it would require a senior employee vacating an office. Regardless of this factual finding, we conclude that under the circumstances, Brooks' comments were not made with discriminatory intent and the State has not shown sufficient proof of Brooks' violation of the IWD work rule or the ADA policy.

As previously discussed, the State has not demonstrated that Brooks was aware, prior to his meeting with Landess, that management had determined to move IV into an office to accommodate her sensitivity to lighting. IV had raised several other suggestions that seem like viable options such as raising the cubicle walls. Although the Ergo Report recommended an office space as the reasonable accommodation, even DeHeer stated that the Ergo Report was a recommendation and management had to make the final determination on the accommodations. We find that Brooks' statements, if Brooks actually

made the statements, were made out of frustration with management about their decision and at his situation of having to tell an employee that the employee would be moved out of an office. Brooks also believed that the paperwork that was generally required for a reasonable accommodation had not been completed, which may have amplified his frustration at management's decision. Brooks' reaction and comments are understandable given his situation, and were not directed at IV or the necessity of an accommodation, but instead at the accommodation option that IWD management chose to implement.

Brooks hired IV and worked with her during and after the hiring process to ensure the agency was assessing that she had the tools she needed to perform her job. The State has not shown, after an examination of the totality of the circumstances, just cause for Brooks' termination due to his alleged discriminatory actions or comments.

The Board has fully considered all of the State's other arguments on appeal. None have persuaded us to reach conclusions different than those reached by the ALJ. Accordingly, we enter the following:

ORDER

Iowa Workforce Development shall reinstate Doug Brooks to his former position as Workforce Development Manager in the Promise Jobs program (if the position still exists, and if not, to a substantially equivalent position), with back pay and benefits, less interim earnings; restore his benefit accounts to reflect accumulations he would have

received but for his discharge; make appropriate adjustments to his personnel records; and take all other actions necessary to restore him to the position he would have been in had he not been discharged.

The Board retains jurisdiction of this matter in order to address any remedy-related matters which might hereafter arise and to specify the precise terms of the remedy. In order to prevent further delay in the resolution of this matter, in the event the parties fail to reach agreement, the Board will schedule a hearing to receive evidence and arguments on the precise terms of the remedy, within 45 days of the date below. Agency action will not be final until the appropriate remedy is approved or determined by the Board. The Board retains jurisdiction to enter whatever orders may be necessary or appropriate to address any remedy-related matters which may hereafter arise.

DATED at Des Moines, Iowa this 19th day of April, 2018.

PUBLIC EMPLOYMENT RELATIONS BOARD

Michael G. Cormack, Chair

Jamie K. Van Fossen, Board Member

Mary T. Gannon, Board Member

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APPENDIX A

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

DOUG BROOKS, Appellant, and STATE OF IOWA (IOWA WORKFORCE DEVELOPMENT), Appellee.	CASE NO. 100778

PROPOSED DECISION AND ORDER

Appellant Doug Brooks filed this state employee disciplinary action appeal with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 8A.415(2)(*b*) and PERB subrule 621—11.2(2), alleging the termination of his employment from the Iowa Workforce Development (IWD) on March 31, 2016 was without just cause.

Pursuant to notice, a closed evidentiary hearing on the merits of the appeal was held before me on March 29, 2017, in Des Moines, Iowa. Brooks was represented by attorney Mark Hedberg. The State was represented by attorneys Nathan Reckman and Jeffrey Edgar. Both parties submitted post-hearing briefs, which were received on May 1, 2017.

Based upon the entirety of the record, and having reviewed and considered the parties' arguments, I make the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

Brooks started his state employment in December 1997 with the Iowa Department of Human Services (DHS). He transferred to IWD about six months later as a workforce associate and received his first promotion in January 2000 to a workforce advisor. Brooks subsequently received a supervisory promotion to a workforce development manager in May 2009. He held this position until March 31, 2016 when IWD terminated his employment for discriminating against an employee on the basis of her disability. Brooks' termination letter does not provide any factual specificity as to how Brooks discriminated against the employee, but the record as a whole reveals that IWD concluded Brooks' failure to provide the employee with certain recommended accommodations amounted to disability discrimination.

The termination of his employment was the only discipline Brooks received during his 19-year tenure with the State. His annual employee performance evaluations demonstrate he consistently met or exceeded performance expectations. As a supervisor, Brooks' superiors evaluated him as being supportive of the IWD mission and a positive representative of the agency. Brooks was well-respected by his staff, considered a "great coach" and a responsive manager. Under Brooks' supervision, it was recognized that his staff demonstrated growth and positive teamwork.

Brooks' tenure with IWD was in "Promise Jobs," a federally funded program whose mission is to remove barriers to employment, such as lack of transportation or childcare, by way of education, job training and family planning services, and enable the program participants to become self-sufficient. Promise Jobs is jointly operated by DHS and IWD.

At the time of his termination, Brooks supervised and managed approximately 25 workforce advisors in the Promise Jobs program across twelve counties statewide. He was tasked with the hiring, training, assigning, and evaluating the performance of the staff under his supervision.

At all times pertinent to this appeal, Jennifer Reha was Brooks' direct supervisor. Reha and Brooks were co-managers at the same Des Moines location until October 2015, when Reha was appointed as the interim district manager for Central Iowa. She was then reassigned to a newly created position in January 2016 when Jason Landess was hired as the permanent district manager. Reha remained Brooks' direct supervisor and Landess was above both Reha and Brooks in the supervision hierarchy.

Sometime in the fall of 2015, IWD advertised a bilingual workforce advisor vacancy it had on the Promise Jobs team that Brooks supervised. Brooks and Reha headed this hiring process. IV, a permanent state employee at a different state agency, applied for vacancy and was selected for an interview. IV disclosed on her initial application that she has a visual disability and, prior to her

interview, she requested that Brooks provide her with the interview materials in 18-point font as a reasonable accommodation. Brooks responded that it "will not be a problem at all" to accommodate her request.

Reha and Brooks interviewed IV on December 7, 2015. IV inquired at that time whether the employer was willing to provide reasonable accommodations for her visual disability, to which Reha and Brooks both responded that accommodations would be provided. IV explained she had the majority of the assistive technology for low vision she needs but that an assessment should be conducted prior to her start date to determine if any additional accommodations may be needed given the new job functions and work space. Brooks and Reha did not express any opposition to IV's requested assessment.

Following the interview process, Reha and Brooks determined IV was the best applicant for the advertised vacancy. As such, on December 15, Brooks offered IV the workforce advisor position and she accepted the job offer.

On December 16, IV sent Brooks an email explaining the reasonable accommodation assessment would be a "two-prong approach," with the first prong discussing technology accommodations and the second prong conducting a survey of her work space. IV again indicated she had the majority of the occupational technology accommodations she needed but additional ones may be required in her new role or they may need to resolve software compatibility issues between her current technology accommodations and IWD's computer systems. The purpose of

the work space survey was to evaluate her desk positioning and the lighting above her work area since her visual disability involves sensitivity to bright lights.

The day after receiving IV's December 16 email, Brooks reached out to IWD's premises department to schedule the workspace survey and the IT department to discuss IV's technology-related accommodations. He informed IV the same day the workspace survey was set for December 22 and that the IT department had not responded to him yet regarding the technology-related assessment.

Diana DeHeer, a management analyst with IWD and the designated staff who regularly conducts ergonomic assessments for the agency, met with IV and Brooks on December 22 to conduct the workspace survey. IV surveyed two vacant cubicles that were identified as possible workspaces and immediately noted the current lighting above the cubicles was an issue given her sensitivity to light. She noted neither cubicle was ideal but that one was slightly better for her in terms of lighting. IV suggested several options to address the lighting issue, such as raising the cubicle walls or turning off the ceiling light above her cubicle, a method she used at a previous job. IV also indicated she was open to trying blue light filters although she had not used those in the past.

Following the workspace survey, IV sent DeHeer and Brooks an email outlining her current technology accommodations, which stated, in pertinent part:[1]

> I'm also including a rough draft of the list of accommodations incorporated in my current job:
>
> Monitors: I have two 13-inch flat panel HP LP2065 monitors which for the most part work very well with my low resolution settings; Wide monitor screens do not work well for me.

Brooks thanked IV for the information and informed her that DeHeer and Carrie Stief, an administrative assistant in Promise Jobs, would be in contact with IWD's IT staff to discuss the information provided.

DeHeer forwarded IV's email the same day, December 22, to Martin Moen, IT Infrastructure Manager, and Gary Batemen, IT Manager, asking them to schedule a meeting with IV, her contacts from the Department for the Blind and Brooks, to discuss with IV any technology accommodations she may need. DeHeer informed Moen and Bateman that IV's first day with IWD is January 15, 2016 and added that IV "understands that everything will not be in place by her employment date, but [she] would at least like to have the conversation started."

Having received no communication from IT following DeHeer's December 22 email, IV reached out to DeHeer and Brooks on January 3, asking:

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[1] IV's email also indicated she has anti-glare screens for her monitors. She listed computer and other assistive programs for low-vision that she was using or expressed an interest in using. The implementation of these technology accommodations has not been raised by the State as a basis for Brooks' termination.

> Have you [DeHeer] or [Stief] had an opportunity to touch base with your IT team for a possible meeting as discussed and has upper management responded to the lighting accommodations recommendations?

Although not explicitly stated, IV's second question about lighting accommodations appears to be a reference to the various options IV suggested during the December 22 workspace survey. IV's email prompted both Brooks and DeHeer to follow up with IT about the meeting request DeHeer made on December 22.

Moen eventually scheduled the requested meeting for January 11, which was a phone conference that included IV, her contacts from the Department for the Blind and Brooks. The technology accommodations discussed included, in pertinent part to this appeal, the computer monitors that IV needs due to her visual disability. IV informed Moen, as she had stated in her December 22 email to DeHeer, of the specific model of square shaped monitors (HP LP2065) she had used that met her visual needs. Moen informed IV the HP LP2065 had to be ordered through a vendor and may not be delivered by her start date, but that IWD had other square monitors in stock that could be set up for her immediately.

Following the phone conference on January 11, Moen forwarded to Brooks a quote for square monitors he received from a state vendor, a vendor that indicated "this is the only square one [monitor] available through HP WSCA." The record does not reveal what specific monitor model was quoted but based on the vendor's response, it does not appear the quote was for the HP LP2065 model. Brooks

responded to Moen that he had several "HP 1950g's" in stock and that he will set up one or two for IV on her first day, depending on whether she wants to work with a single or dual monitors. The HP 1950 model is a square shaped monitor. The record does not reveal that Moen had any further response to Brooks' plan to use the HP 1950 model.

January 15 was IV's first day with IWD and her day started with a "morning huddle" among the Promise Jobs team. She introduced herself, openly sharing that she is legally blind and while the staff may see her completing tasks differently, she is fully capable of getting the work done. Brooks had set up IV's work station in the cubicle she previously indicated had slightly better lighting and provided her with two square shaped computer monitors he located in stock. In setting up her equipment, Brooks discovered a connectivity issue between the monitors and the new laptop where only one monitor would work at a time. Brooks attempted but was unable to fix the issue himself and reached out to the IT help desk for assistance, who asked him to call in to troubleshoot. When IV called IT as instructed, the help desk indicated the only staff available was dealing with another issue and asked her to call back the next day.

Close to the end of IV's first day with IWD, DeHeer emailed Brooks and IV, at IV's personal email address, with a copy to Landess, Reha, Stief and Eddie Sauls, an employee of IWD, and stated:

> Please find attached my recommendations for work space accommodations for [IV]. She has special needs that we need to

> accommodate. In my review, I did recommend that we place her in an office with a door and lights that she can manually adjust herself, which will affect no one else.

In the attached six-page document titled "IWD/430 Office Ergonomics Evaluation Form" ("Ergo Report"), some recommendations were unrelated to IV's accommodations, such as replacing an old chair; but the accommodation-related recommendations stated, in pertinent part:

> Symptoms: Vision/Lighting Issues. Bright light is a huge issue for [IV]. She will require accommodations to enable her to readily read printed and computer-generated materials. She has her own personal CCTV (closed circuit tv) which she will be bringing and setting up in her cubicle. Her biggest concern is the bright lighting in the office. (The lighting in the area is within the OSHA standards).
>
> ***
>
> [IV] has a team of professionals that she already works with from the Iowa Department for the Blind. I have sent emails to IWD/IT with [IV's] technology needs which were provided to IWD by [IV]. IWD IT Team should be working with [IV] and her professional team from the Department for the Blind on her technology issues.
>
> ***
>
> Monitor Recommendations: [IV] has an issue with bright lighting & glare, along with vision. I have suggested to IT a monitor that [IV] knows will currently work for her needs. (HP LP 2065). She has indicated that the more square-shaped monitors work better for her. Widescreen monitors cause issues for her.
>
> ***
>
> Work habits Recommendations: [IV] starts on January 15 and does not fully know what her job will entail. She will adjust work habits as she is trained in her job.
>
> ***
>
> Misc.: Bright lights in the general office area are a huge issue for [IV], and this is the one issue that we really need to address. We talked about ways in which we could possibly make the cubicle lighting work for [IV], none of which will be a good fit for other employees in the area. [IV] indicated if we put taller walls around just her area then this lighting issue would not affect anyone else.

> The new vision for the agency is not to have taller walls on the floor, so this will not work either. The lighting at IWD/430 2nd Floor is within all OSHA standards.
>
> My recommendation for [IV] is to be placed in an office with hard walls and a door. This would enable [IV] to dim the lights if need be, shut the window treatments if need be and all without affecting the lighting of other staff members. We need to make this accommodation for [IV].
>
> There are available offices at IWD/430 2nd Floor which can be used by IWD/430 management to address this accommodation. However, these offices are currently occupied by IWD staff not entitled to an office space in accordance with DAS [Department of Administrative Services] space standards. (We can provide DAS space standards if necessary). Therefore, IWD/430 E. Grand management has the ability to move staff accordingly to make this accommodation. Employee accommodations trump any employees just wanting to be in an office.

The Promise Jobs work location included six offices, with Landess and Brooks occupying two of them and the rest having being assigned to staff based on their seniority or particular job duties. IV responded to DeHeer on January 19, thanking her for compiling the report and adding that she will also need two anti-glare filters for her monitors.[2] DeHeer instructed IV to provide Brooks with the specific information on the anti-glare screen filters needed. The record shows IV sent Brooks the information on January 21 and she received the anti-glare filters on February 1. In the same email response, IV also notified DeHeer (and the rest of the original recipients except Landess) that she and Brooks were still working

[2]All recipients of DeHeer's Ergo Report email were included in IV's reply except Landess, who appears to have been inadvertently excluded from the reply as IV first forwarded DeHeer's email to her IWD email account and, as such, had to manually type in recipient addresses in her reply.

on the dual monitor connectivity issue and that an assistance ticket had been submitted to the IT help desk. IV gave no indication that the specific model of square monitors Brooks provided would not meet her needs.

About an hour later on the same day, January 19, IV responded to DeHeer's email string, again including all the original recipients except Landess, with the inquiry: "For my own reference, what follows after the recommendations? What's the timeframe for the final 'drum rolls' determination?" DeHeer explained that she had "made [her] recommendations to management" and the next step is to "wait for [a] response from management." No other emails pertaining to DeHeer's Ergo Report were exchanged.

IV started the workforce advisor training her first week with IWD, with Brooks overseeing and coordinating her training. The advisor training consists of an orientation session to familiarize them with the Promise Jobs program, two weeks of "work readiness" classes consisting of instructor-led class sessions and reviewing program manual and procedures outside of class, a statewide training, and job shadowing other advisors and their interactions with clients. For the instructor-led courses, Brooks informed the instructors of IV's visual disability and asked them to provide her with training materials in larger font. The advisor training does not have a set duration period but can last up to a few months. After the training is completed, new advisors transition into taking case assignments, at

first with guidance of other advisors for a few weeks, or until they feel comfortable handling case assignments on their own.

Workforce advisors use two databases—"iWorks" and "PJCase"—in their work. On January 21, Brooks contacted the designated staff to grant IV access to "iWorks" but, for reasons not explained in the record, the designated staff he contacted did not complete the request until February 1. Brooks started the approval process for IV to receive access to "PJCase," which is a DHS-controlled database. Obtaining access to "PJCase" first involves getting a "T number" for the employee and then multiple steps of approval prior to DHS granting access to its database.

During an in-person meeting with Brooks on January 21, IV inquired about the status of management's decision on the lighting accommodations. She emphasized that having those accommodations in place will allow her "to perform at an optimal level." Brook responded the accommodations were "in the works" and that she "just basically had to wait."

Landess and Reha also had separate in-person meetings with IV on January 21, although the order of the meetings is unclear. Reha's purpose in meeting with IV was to just check in like she does with every new employee. During their conversation, Reha told IV that management was working on arranging an office for her. IV responded that she did not want to be placed in an office because "it was made very clear" to her that the available office space was given based on

seniority and she thought there would be animosity if she were placed in an office. Even though Reha asked, IV did not wish to disclose who told her seniority determined office assignments. Reha assured her management makes those decisions and if IV thinks that having an office would be best for her as the Ergo Report recommended, she should be in an office. IV then stated that if it does not create too much trouble, it would be best to be in an office to be able to control the lighting. Reha advised her if she gets any backlash from anyone she should inform her immediately, adding that even though Brooks is her supervisor, IV needs to come to Reha immediately and she "will take care of it." As the subsequent DAS investigation revealed, Reha inaccurately concluded at this time that Brooks was the source of IV's information regarding seniority and IV's concern that staff would be upset if she were moved to an office.

Landess' purpose in meeting with IV was also to check in and have a brief talk. He generally let IV know if she needs accommodations to do her job, she should feel free to approach him and let him know so that they can accommodate her. Landess also told IV that he will have the same expectations of her as of any other employee so if a lack of an accommodation is impacting her ability to perform, she should inform him of such. IV did not indicate that anything was negatively impacting her performance or work at that time.

At some point during Landess' meeting with IV, she mentioned "something with seniority, and she just doesn't want to create an environment where people

are upset with her." Landess did not inquire about the source of the "seniority" comment or the basis for her concern.

After his conversation with IV on January 21, Landess approached Brooks to discuss IV's office accommodation, a meeting that occurred in a closed-door setting. Brooks told Landess the available office space was currently occupied by staff and those offices had been assigned based on seniority. Landess responded that office assignments are not governed by seniority, either contractually or by policy, and further stated that seniority is not a valid reason not to provide office space as an accommodation.

Landess told Brooks to identify the employee who will vacate an office and to make the accommodation for IV, to which Brooks responded that was "bullshit." After a short pause during which Landess did not respond at all, Brooks said he wanted to explain his comment. He stated what he meant by "bullshit" is that employees who have worked hard for 20 plus years finally earned an office and a new employee can "boot them out." Although Brooks has denied it, the record supports a finding that Brooks also stated if he had known an employee would be required to vacate an office, he would not have hired IV. Landess again reiterated that seniority does not control office assignment for his staff and unless there was a legitimate reason why the office recommendation could not be implemented, Landess stated "we need to make the accommodation happen." No other details

regarding IV's move to an office, including its timing, were discussed at the January 21 meeting.

Landess made IWD director Beth Townsend aware of his January 21 conversation with Brooks the next day. Townsend did not find that Brooks' comments warranted an investigation but she directed Landess to remove Brooks from any hiring teams, direct him to sign up for a training class on the ADA, and to inform the IWD equal opportunity (EO) officer, Harvey Andrews, of the situation so he can inquire into the department's compliance with the ADA. By January 22, Landess also made Reha aware of his conversation with Brooks and Townsend's direction on how to deal with it.

Personally, Landess believed that Brooks' comments warranted "a little bit stronger" response than the one Townsend directed. However, consistent with her instructions, Landess drafted a work directive for Brooks. He met with him either the same day or the next work day, Monday, January 25, to issue the work directive. Landess advised Brooks that his comments on January 21 were "inappropriate" and he expected him to always follow directives unless a legitimate reason existed not to obey a directive. Landess also informed Brooks he needs to take a class on the ADA and that he would be removed from all hiring teams. Landess did not provide Brooks with the paper copy he had prepared since it did not print in color as he wanted but informed Brooks he would receive a copy at a later time.

Brooks responded he had "a really bad day, that's why he came across like he did and said it was bullshit." Brooks further explained he had been approached by several staff members that day with complaints and he was just venting to his supervisor behind closed doors. Landess advised his comments were still unacceptable and will not be condoned. Landess did not ask about the staff complaints Brooks received but, as the subsequent DAS investigation revealed, Landess inaccurately concluded at that time the staff complaints Brooks mentioned were regarding IV's placement in an office and that Brooks must have told staff about her office accommodation if they were complaining about it.

During the same "work directive" conversation, Brooks identified the employee who would vacate an office in order to implement IV's office accommodation. When Brooks asked how much time he had to move IV to an office, Landess responded the accommodation needs to be implemented prior to any work expectation being placed on IV. Brooks indicated IV would not have any case assignments until she completed her training and she still had weeks of training left. Brooks also informed Landess that a new phone system was going to be installed and all staff phone numbers would change as a result. Since the agency incurs a fee each time the phone vendor responds to a service request, Brooks explained that the agency would avoid a double charge if they coordinated

IV's office move during the new phone installation.[3] For that reason and the fact IV was still in training with no case assignments, Brooks asked if he can "hold off" on moving IV to an office. The record indicates Landess agreed it was acceptable to delay IV's move, figuring it did not make a difference since she was still in training and had no case assignments, but indicated he would find out the phone installation timeline that Brooks did not know.

On or about January 25, consistent with Townsend's instructions, Landess contacted Andrews to inform him about IV, her disability accommodations and the conversation he had with Brooks on January 21. Andrews stated he would contact IV directly to ask about her accommodations.

IWD deputy director Ed Wallace contacted Reha on or about January 25 to inquire what was happening since he learned about the situation from Townsend. Reha told him she believed the situation was a "serious discrimination issue" and she was taken back that Townsend was addressing it with just a work directive, which Reha did not find to be an adequate response since it involved an IWD manager. She informed Wallace that Andrews was now involved and he could provide additional information.

Andrews visited Brooks unannounced on January 26. He spoke to Brooks "in generalities" about IV's accommodations because he did not know the

[3]Notably, one of Brooks' noteworthy achievements as noted in his April 2015 performance evaluation is that he helped reduce the monthly ICN phone bill by 40% which saved his office $2,000 a month.

particulars of what had already taken place and wanted to give Brooks "the benefit of the doubt to tell [Andrews] what his story was." Brooks explained IV was currently in a cubicle, a number of technical devices had been put in place to assist her, and other items were still being worked out with IT. Brooks also indicated IV was still training and shadowing her colleagues.

When Andrews asked him about office space specifically, Brooks acknowledged he understood that seniority did not govern office assignments but explained that is how the office space in Promise Jobs had been assigned thus far. Brooks also identified which employee would be moved to make space for IV, the same employee he identified for Landess. Brooks indicated to Andrews that he understood IV did not have to be moved to an office until she was done with training. He also stated that he was presently "dealing with technology stuff for her, and that if it worked out where she currently was, that's fine, and if it didn't," if she had to be "moved to an office, then he would do that." When Andrews asked to speak to IV, Brooks walked him to her cubicle but she was away in training; Brooks offered to get her but Andrews indicated it was not necessary and he would contact her directly.

Andrews informed Landess that same day about what Brooks stated when Andrews met with him. Wallace also met with Andrews after Andrews' meeting with Brooks. Wallace indicated he had "very little tolerance for a manager who would speak to his regional manager with a level of disrespect" as Brooks had

demonstrated to Landess. He also expressed concern about Brooks' "attitude" toward IV's accommodations.

Andrews called IV on January 26, after he had spoken to Brooks that same day. IV explained she has light sensitivity and the present lighting in her work space was an issue. When Andrews asked IV what outstanding accommodations she would prioritize, IV indicated that it would be having a work space where she could control the lighting. She asked Andrews to send his accommodation-related questions to her in writing because she wanted Brooks to respond given that "so many things [were] being timed and processed to assist her," this would give her a better idea on the status of those accommodations.

The next day, on January 27, Andrews sent IV an email generally asking if the accommodations she had received were meeting her needs, what additional accommodations were needed now or in the future, and whether she had any concerns that she would like addressed. As she had indicated over the phone, IV informed Andrews she will send inquiries to Brooks "to report on the most current status of requests for reasonable accommodations."

On January 28, Brooks emailed Landess specifically about IV's accommodation paperwork, also including Andrews on the email, which stated:

> Attached is the accommodation paperwork that HR needs. I have also attached the PDQ [Position Description Questionnaire] and PJ [Promise Jobs] essential functions information that DAS used to approve the position in addition to the evaluation completed by premises. With your approval I will give to [IV] tomorrow. How many days is appropriate for the response to be returned?

Along with the email, Brooks attached a reasonable accommodation request form for IV, the Ergo Report prepared by DeHeer, and IV's PDQ and essential functions. Although it is unclear how Landess communicated this, but the record indicates he informed Brooks that the attached forms "should be good."

The attached reasonable accommodation request form contained a section for the employee, the supervisor and a medical provider to complete. Brooks completed the supervisor section, providing his contact information and indicating the request for accommodations was received on December 22, 2015, the date of the work space survey. In the supervisor comments section, Brooks wrote:

> See attached evaluation. Continuing to work with staff member as issues arise including installation of dual monitors. New chair has been ordered from IPI. Delivery date within 45 days.

On the question whether a "medical provider referral [is] required," Brooks marked "yes."

After emailing Landess and Harvey on January 28, Brooks emailed IV just a copy of her PDQ and essential functions that same day informing her that they will review those documents and send to HR once she has signed them.

IV emailed Brooks on January 29 with the subject "Response Needed for EEO inquiries and Misc. Housecleaning Items." The email stated, in pertinent part:

> As you communicated to me, Mr. Harvey Andrews with the IWD's EEO internal office did contact me with some accommodations-related inquiries. I informed him that since you are my direct

supervisor, I would touch base with you first to obtain the current status of pending accommodations, so that I could furnish the most up-to-date and accurate information to him.
Please add the most-up-to-date notes for the following:

1. Monitors: I currently have one square face, flat screen HP monitor and one wide flat screen Dell one. I understand that the square HP like the one I currently have is being phased out and it's getting harder to find. As you know, unfortunately, that widescreen Dell monitor does not meet my visual needs. Do you have an update regarding this request? Perhaps, could we look into inquiring with other IWD offices to see if they have the square-faced ones in their storage that we may be able to have?
2. Monitors' Antiglare Screen Filters: If I recall correctly, these have already been ordered. Any news on this front?
3. Lighting: As I understand it, this accommodation is in the works. A tentative timeframe for resolution would be appreciated.

***

In these two weeks I've been with PROMISE JOBS, I have been able to take notes on some housecleaning items that are directly or indirectly related to my accommodations.

Here are some notes to keep in mind:
Access to IWorks and PJ Case: As you know, I've been reading the information under PJ's SharePoint and have shadowed my colleagues a few times this week. You are also aware of the low resolutions settings I have for my two monitors.

Please keep in mind, that in order for me to truly observe, digest and apply what I've been learning via reading and by sitting with my colleagues while they visit with their clients and document their cases on PJCase and IWorks, I must have access to IWorks and PJCase so that I can obtain concrete guidance on how they work their case(s) and to practice what I've been learning throughout trainings such as the KT one. Having access to these two databases from my own station which has my computer's low-vision settings is a priority. Unlike my coworkers, I'm unable to read their screens comfortably and can't fully benefit from training opportunities.

Upcoming Trainings: When possible, DO send or have presenters send a copy of the PP/Word/Excel doc for me to read prior to the training, and provide the location and format for me to align accommodations in advance. The reason I emphasize planning is that although I sit in the

> front rows to have a better view of the white board, I cannot read all the information projected on it, so having the presentation materials beforehand allows to follow better with the material being presented.
>
> ***

Brooks responded to IV within a few hours to let her know he "will get through these and get back to [her] as soon as possible."

Also on January 29, Townsend contacted DAS to initiate a formal investigation of Brooks. In her email to DAS, which also included Landess and Reha, Townsend stated:

> I would like to have DAS investigate Doug Brooks, manager, for disability discrimination. He has made concerning comments to [Landess] his supervisor that need to be investigated as well as the effect of his recent behavior and comments to and about one of his subordinates who is disabled. I am concerned that she is feeling harassed and retaliated against for exercising her rights under the ADA. Please contact Jennifer Reha to make the arrangements. At this point, I don't plan to suspend him pending the investigation, however, if you think we should, let us know and we will make that happen.

The record does not reveal that Townsend knew of any comments that Brooks made to IV other than the seniority comment that Reha and Landess inaccurately attributed to Brooks at the time, as revealed by the subsequent DAS investigation. The record also does not explain what formed the basis of Townsend's concern that IV was feeling harassed and retaliated against, as IV had not reported such allegations.

Brooks and IV had an in-person meeting on February 1 to discuss her PDQ, as he previously informed her they would discuss. IV inquired on the status of her

outstanding accommodations, and Brooks instructed her to complete the DAS accommodation request form and that further updates will be provided. He then emailed her after the meeting, stating:

> As we discussed this morning I've attached the documentation that is needed. You will find the evaluation done by Premises, the DAS Request for Reasonable Accommodation as well as the signed PDQ with essentials functions.

Brooks attached the Ergo Report completed by DeHeer, IV's signed PDQ, and the DAS Request for Reasonable Accommodation form, which were the documents he had sent to Landess and Andrews the previous week.

Andrews continued his ADA compliance inquiries even with a formal investigation being conducted by DAS. On February 1, he reached out to IV again indicating he had not heard back from her or Brooks regarding the questions he posed to her. Andrews let her know he is interested in knowing how the agency can better accommodate her needs and to reach out to him with any questions or concerns. IV replied, including Brooks on her email, that she reached out to Brooks to "obtain the most up-to-date and accurate info on some of the pending reasonable accommodations requested." She further stated:

> Please know that I do appreciate your attention to this matter. The timing of the incorporation of reasonable accommodation does have a either positive or negative impact on my performance. This is why I have a foot on the pedal. ☺ I will keep you posted.

The next day, on February 2, Brooks replied to IV's January 29 email about the status of the pending accommodations, which stated:

- Monitors: Square monitors in stock are not compatible with dual monitor installation. If cable to connect both monitors cannot be found with either need to order cable or new monitor.
- Antiglare filters: These have been delivered.
- Lighting: Once the dual monitors are installed and accommodation paperwork has been received further updates will be available.
- Access to IWorks and PJ Case: Access to I-Works has been set up. The T# required to gain access to the DHS systems has been requested. Once the Curion requests have been approved further access will be provided. This is not unusual as it is a process that not only involves IWD IT, IWD QA and DHS IT to make it all happen.
- Trainings: Documents that are available prior to the training and in electronic format can be sent to you.

IV forwarded Brooks' response to Andrews the following day, February 3, letting him know to reach out to her if he had any questions. That same day, Reha notified IV of the DAS investigation and that the investigators wished to interview her. DAS sent IV a calendar invite for an "Interview Regarding Workplace Environment" to be held on February 5.

On February 4, after IV was informed about the DAS investigation but before her scheduled interview on February 5, Landess and Reha met with IV regarding her accommodation request form. They asked her to only complete the employee information section, provide a description of the requested accommodation and an indication why the accommodation is necessary. Landess and Reha changed Brooks' earlier mark that a medical provider referral was required, informing IV that she had provided them with sufficient information to show she has a disability and the medical provider referral was not necessary. Landess and Reha also told IV they are not opposed to her office accommodation

but "they are just waiting for [Brooks] to take action." They indicated that they had consulted the DAS manual and confirmed that office assignments have nothing to do with seniority.

Landess, Reha, Andrews, IV, Moen and Brooks were interviewed by DAS, and the information and documents collected as part of the DAS investigation form the evidentiary basis for the facts found above.[4]

Landess was interviewed on February 1, the first witness to be interviewed. He confirmed IV had never reported that she felt harassed, discriminated or retaliated against due to her disability or request for accommodations. Landess stated he never gave Brooks a copy of the work directive they discussed because Townsend told him to "hold up" on the work directive because she had talked to Andrews and now thought there was more to the situation than they originally thought.

After Harvey met with Brooks regarding IV's office accommodation, Landess indicated Andrews relayed to him that Brooks' understanding was that he did not have to move IV to an office until she was done with training. Andrews further relayed to Landess that Brooks planned to assess how IV does in her cubicle during that time period with all her technology accommodations in place. Landess reported to the investigators his directive to Brooks had no room for an

[4] The investigation requested by Townsend was initially limited to disability discrimination. However, in response to allegations made during the investigation, Brooks was also investigated for sex discrimination and retaliation against IV, both allegations which were determined by DAS to be unfounded.

assessment on how IV does in her cubicle, but was clear that IV would be moved to an office.

As far as the timing of IV's move to an office, Landess did not disagree with Brooks' understanding that he did not have to move IV until she was done with training. Instead, Landess told the investigators that after he and Brooks discussed delaying IV's move to an office while she was in training, Landess overheard IV having a phone conversation with what "sounded like" a customer. Landess indicated that was contrary to what Brooks told him when he said IV would not have any case assignments. The investigators commented to Landess that he may still have follow-up to do with Brooks "regarding the current state of matters" and Landess responded that he did. The record, however, does not indicate that Landess ever followed up with Brooks regarding IV's office accommodation after his interview on February 1.

Reha was interviewed on February 2, the second witness to be interviewed. Reha indicated she was not involved in IV's training but was aware that Brooks informed IV's trainers for the upcoming classes of IV's visual disability. Reha told the investigators that she still wondered if the classroom settings and available equipment in training rooms were meeting IV's needs and that she intended to ask Brooks about it but she "just left it by the wayside" because she knew her interview with DAS was coming up.

Reha reported that she had a conversation with Brooks just prior to her interview and Brooks indicated that he will have an employee from IWD's land administration look at IV's computer setup to see if anything could be done with IV's "monitor situation." Reha did not know the precise issue that existed, but gathered that it had to do with the size of IV's monitors and did not understand why IV was not provided monitors that fit her needs. Reha also believed that IV would not have that issue with her monitors if she were placed in an office.

Reha told the investigators that she believed Brooks was treating IV differently based on her disability and request for accommodations and Reha was concerned that IV did not have Brooks' support. Reha's belief was based on her January 21 meeting with IV during which IV indicated it was made clear to her that offices are assigned by seniority. Reha told the investigators that the information regarding seniority and IV needing an office accommodation must have "trickled down" from Brooks because "if [Brooks] wasn't talking about it" there is no other way his staff would know IV needed an office. Reha stated that she does not think IV would say anything because Reha believed she was "feeling a little beat down."

Andrews was interviewed on February 3, the third witness to be interviewed. Andrews confirmed IV had not indicated to him that anyone was being negative to her. Andrews shared his personal observation with the investigators that "[IV's] been very careful not to [] rile her supervisor." His basis for this conclusion is that

IV asked Brooks to respond to his questions first instead of directly responding to Andrews herself. Andrews indicated he had kept Townsend, Wallace and Landess in the loop about his interactions with both IV and Brooks.

IV was interviewed on February 5, the fourth witness to be interviewed as part of the DAS investigation. It is unknown on this record exactly what information was shared with IV regarding the investigation prior to her DAS interview, but whatever was communicated prompted IV to construct a timeline of events and bring supporting emails that dated back to December 1 when she was first offered the opportunity to interview for the vacancy.

IV told the investigators when she asked Brooks about the status of the lighting accommodation on January 21 and February 1, she found his response that she just needed to wait to be a "very non-committal, laisse faire attitude" toward the accommodation. IV explained she does not know her supervisor that well, but believed his "non-committal" attitude possibly stemmed from his failure to understand that having the lighting accommodation in place is a priority for her. In regards to computer monitors, IV indicated that she had two square monitors but that only one worked. IV indicated that she did not have updates on the status of the accommodations when Andrews reached out to her and that is why she asked Brooks to respond first.

IV confirmed she was still training and did not have any case assignments. When the investigators specifically asked IV if she had accommodations in place

for the trainings thus far, IV explained that she still did not have access to "PJCase" that workforce advisors use to notify DHS that clients have completed the necessary Promise Jobs paperwork. For that reason, IV indicated the training "has been sort of half there" because she is unable to access "PJCase" from her work station that has her computer settings and she cannot always comfortably see her co-workers' screens when she is shadowing them. She was informed the database is controlled by DHS and involves a multi-step process to obtain access to it but that the approval for access was requested.

IV confirmed that Brooks never told her anything about seniority. IV explained to a co-worker that the Ergo Report recommended IV be placed in an office to accommodate her light sensitivity. Because she did not want to "make waves" in her new job, IV asked that same co-worker what the rest of the team would think if she as a new employee were placed in an office, whether they would think it's preferential treatment or understand it has to do with a disability. The co-worker told IV her understanding was the offices were assigned by seniority.

IV expressed that Brooks had been "sort of condescending" to her when she inquired about "certain things" although she did not provide examples. When asked by the investigators if she believes Brooks is treating her differently based upon her disability or request for accommodations, IV responded "I can't read his mind" and that what she had observed so far is that things are "not being communicated, delayed, and no action." She wished for more communication to

be maintained with her on how the implementation was progressing, although she did not need to be privy to every detail but it would be helpful to receive an update every other week or so on the status of the accommodations. IV expressed her willingness to try any recommendations to anyone that had talked to her about it, but told the investigators that she knows "as things are now, they are not going to yield for me an optimal performance."

On February 5, the first day Brooks was out on vacation, a workforce advisor on Brooks' staff, who was in one of the available offices, bid for a transfer opportunity to a different location and was certain she would get it because she had the most seniority. The employee informed Landess of her intent to transfer and volunteered to vacate her office for IV. She stated that she did not need to know any details regarding IV's accommodations, but since she was transferring out, it made no difference to her if she moved out of her office. Landess saw this as "the opportunity to move" IV partly because it eliminated the issue of having to remove an employee from an office.

Landess also decided to move IV to an office at that time because he found out the phone installation would not be for another three or four months, not the few weeks he initially thought, and he also thought he overheard IV talking to a client which indicated to him she had case assignments. Based on this information and his subsequent conversations with Andrews and Sauls, Landess felt that IV's move to an office should not be delayed any longer. Landess

discussed IV's office move with her on February 10 and she was moved to an office on February 12. The record does not demonstrate that Landess ever informed Brooks of his changed position that IV's office move should not be delayed any longer, or what information caused him to reassess his earlier agreement to a short delay. All of this activity occurred while Brooks was on leave from February 5 to February 12.

Upon Brooks' return to the office on February 15, he learned IV was moved to an office after an employee transferred out, which left a vacant office. Brooks made no comments to IV or any other staff member about her move to an office, other than just recognizing that the move had occurred.

Brooks was interviewed on February 16 as part of the DAS investigation. Brooks was informed that Townsend asked DAS to conduct an investigation of which he was the subject and the investigation could lead to disciplinary action. Brooks acknowledged his familiarity with the IWD work rules, the State Employee handbook, and the EEO/AA/AD policy. Unlike Landess and Reha who were informed at the start of their interviews that the investigation was regarding possible disability discrimination, Brooks was not apprised about the specific allegation for which he was being investigated. Several of Brooks' responses suggest that he thought he was being investigated for the comments he made to Landess on January 21, telling the investigators that Landess told him he would

receive a work directive and "that would be the end of it...and then here I am today."

When asked about IV's computer monitors, Brooks indicated he provided her with two square shaped monitors he found in stock but that a connectivity issue prevented both monitors from working at the same. He ordered a cable to fix the issue prior to leaving for vacation and installed it that morning before his DAS interview, which fixed the dual monitor connectivity issue.

When asked about IV's office accommodation, Brooks acknowledged Landess told him that IV needed to be moved "as soon as possible" but also indicated that he and Landess had a subsequent meeting during which they discussed the timing of the move. Brooks explained the phone installation they discussed and indicated his understanding of the plan, after that meeting, was to wait to move her during the phone installation. Brooks indicated Landess said he would contact the designated phone staff to find out the exact timeline, with both of them understanding if Landess found out the phone installation would take too long, they would not wait for the phone install but move her sooner. Brooks explained that while he was out on vacation, an office opened up when another employee transferred and Landess moved her to an office at that time.

The next day, on February 17, Brooks and IV had an interaction regarding the settings on her provided square shaped monitors. IV indicated she needed monitors that had the ability to adjust the orientation settings to have one monitor

in portrait and the other in landscape orientation. Since IV's low resolution settings make the text and images significantly larger on her screen, having two different orientations allows her to quickly drag documents from portrait to landscape, which allows her to view the outer edges of documents that are generally cut off in portrait orientation screens. Brooks asked her to find out if her current monitor model had that capability. She confirmed they did not and emailed that information to Brooks. IV then visited his office and asked if they could order the HP LP2065 model she used at her previous job. Brooks responded that they don't tell IT what they need, but that IT "tell[s] us what they have and we choose from it" and that the State has certain vendors from which it purchases.

IV understood Brooks' statement to mean that "IT has the last word" on technology-related equipment that could be purchased for an accommodation. She immediately visited with Reha to check the "veracity" of Brooks' statement as she understood it. Reha then called Landess into the meeting with IV and they told her that IT did not have the last word and they would find a way to order the monitors she needs. Landess told Brooks later that day that if IV needed certain monitors, they could get those even if it required going outside of IT's contracted equipment and vendors.

Brooks replied to IV's earlier email in the day about her current monitors not having the needed orientation capabilities, including Landess on his response:

> Thank you for checking on that [IV]. Previously you had indicated you were using a 13 inch HP LP2065. I was unable to find that particular

> model on the hp.com website. I will send a note to IT to find out the current models that we are buying under contract and will forward that information to you once it is received.
> In the meantime feel free to use some of your time to check the HP or Dell websites to see if there is a monitor that may be what you are looking for. We have contracts with both I believe so if there is one that may be better than another please let me know.

The next day, on February 18, IV contacted the DAS investigators to indicate she had additional information to provide. IV indicated she now had "a different perspective" on the situation after putting together the timeline and thinking about the questions the interviewers posed at her first interview. IV stated that she feels there is "personal bias" and that she is being treated differently because Brooks believes that she is receiving preferential treatment.

IV provided the investigators an "addendum" to the timeline she provided during the first interview on February 5. The addendum contained four additional entries, two of which pre-dated her February 5 interview, and all of which were based on her recollection of verbal communications she had with Brooks. The only entry provided that is pertinent to this appeal is IV's described interaction with Brooks the previous day, February 17, about ordering the HP LP2065 computer monitors.

Brooks was interviewed again on February 19 and was still not apprised of the specific allegations for which he was being investigated, merely that DAS had been asked to conduct an investigation of which he was the subject. Brooks was

placed on administrative leave on February 19 and remained on leave until his subsequent termination.

DAS completed its investigation on March 14, 2016, concluding "Brooks violated the State EEO, AA, and Anti-Discrimination Policy and the IWD work rules by discriminating against [IV] based on her disability." DAS found that IV's training was "adversely affected due to Brooks' failure to move [IV] into an office and to timely address the issues with her square monitors." After receiving DAS' investigative report on March 14, Landess contacted the investigators to inform them of a conversation he had with Moen on March 8. Landess stated that Moen reported to him that Brooks told Moen to stop "all of our technological advancement" for IV. In response to the information received, DAS interviewed Moen on March 18.

When asked whether Brooks informed him "to hold off on assisting with anything, regarding any IT with [IV], like with any of her monitors?" Moen responded:

> Yeah, he- well, so we- I had given him the information for ordering equipment, and he told me that he wasn't going to be placing those orders, so- .... he thought he had the equipment that was needed. He- like I said, there was a specific model that she had requested. We got him that information, and he told me he wasn't going to place that order, that he thought he had the right equipment on hand already in the office.

Moen indicated that he had spoken to Landess after March 1 about getting monitors ordered for IV. He indicated that he had to look up a different model of

monitors but he got the quote from the vendor and provided that information to Landess.

An addendum to the investigative report was completed on March 29 to include information that was gathered from Moen's interview but that information did not change DAS' conclusion that Brooks discriminated against IV due to her disability.

Based upon the investigative findings and conclusion, IWD determined the appropriate discipline was to terminate Brooks' employment and issued a letter of termination to Brooks on March 31, 2016, which stated:

> Effective March 31, 2016, your employment with Iowa Workforce Development (IWD) is terminated. This action is being taken as a result of an investigation which revealed that you discriminated against an IWD employee on the basis of her disability in violation of the Equal Opportunity, Affirmative Action, and Anti-Discrimination Policy for Executive Branch Employees, and the following IWD Work Rule:
>
> *IWD Work Rules*
> *3. Personal Action and Appearance*
> *The following are prohibited:*
> *a. Harassing or discriminating against employees, clients or the general public on the basis of their race, color of skin, sex, age, disability, pregnancy, national origin, religion or creed, sexual orientation or gender identity.*

The pertinent language of the State of Iowa Equal Opportunity, Affirmative Action, and Anti-Discrimination (EEO/AA/AD) policy referenced in the termination letter states:

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D. DISCRIMINATORY PRACTICES IN VIOLATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990

> The State of Iowa and its departments, agencies and other instrumentalities and all their employment practices, services and programs shall comply with the requirements of the ADA. The ADA requires, in part, that the State of Iowa:
>
> 1. Make reasonable modifications in policies, practices, and procedures that deny equal access to individuals with disabilities, unless fundamental alteration in the program or an undue hardship would result.

***

E. COMPLAINT REPORTING PROCEDURE

> Any person who feels that he or she has been denied an employment opportunity or has had the terms and conditions of their employment adversely affected because of ... physical or mental disability ... has the right and is encouraged, to file a complaint with the person's department, pursuant to the department's complaint procedure. A person may also file a complaint with the Iowa Civil Rights Commission or the appropriate federal enforcement agency.

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> Department directors shall promptly investigate all complaints. Each agency shall take final agency action in response to a complaint. **Corrective action shall be taken immediately to remedy violations of this policy, whenever warranted, up to and including the discharge of parties whose conduct violated this policy.** A manager or supervisor who fails to properly act upon complaints or who has personal knowledge of a violation of this policy and fails to take appropriate action shall be subject to disciplinary action up to and including discharge.

Brooks timely filed an appeal of his termination with DAS on April 5, 2016 pursuant to Iowa Code section 8A.415(2)(*a*).

In lieu of a third-step meeting, the parties submitted documents to the DAS designee which formed the basis of DAS' third-step response. DAS found sufficient proof that Brooks "engaged in discriminatory conduct against IV." DAS further concluded that Brooks knew what the accommodations entailed but "yet [Brooks] balked and delayed the accommodation process." DAS denied the grievance on October 28, 2016 and Brooks filed the instant appeal with PERB on November 10, 2016.

CONCLUSIONS OF LAW

Brooks filed the instant appeal pursuant to Iowa Code section 8A.415(2), which states:

> 2. *Discipline Resolution*
>
> a. A merit system employee .. who is discharged, suspended, demoted, or otherwise receives a reduction in pay, except during the employee's probationary period, may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.
>
> b. If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board ... If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies.

The following DAS rules set forth specific discipline measures and procedures for disciplining employees.

> **11—60.2(8A) Disciplinary actions.** Except as otherwise provided, in addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when the action is based on a standard of just cause: suspension, reduction of pay within the same pay grade, disciplinary demotion, or discharge... Disciplinary action shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, refusal of a reassignment, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave, unrehabilitated substance abuse, negligence, conduct which adversely affects the employee's job performance or the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

The State bears the burden of establishing that just cause supports the discipline imposed. *See, e.g., Phillips and State of Iowa (Department of Human Resources)*, 12-MA-05. The term "just cause" as employed in section 8A.415(2) and administrative rule 11—60.2 is not defined by statute or rule. *Stockbridge and State of Iowa (Department of Corrections)*, 06-MA-06 at 21. Determination of whether management has just cause to discipline an employee is made on a case-by-case basis. *Id.* at 20.

While emphasizing there is no "fixed test" to determine the presence or absence of just cause, the Board has instructed that an analysis of the following factors may be relevant:

> While there is no fixed test to be applied, examples of some of the types of factors which may be relevant to a just cause determination, depending on the circumstances, include, but are not limited to: whether the employee has been given forewarning or has knowledge of the employer's rules and expected conduct; whether a sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately communicated to the

> employee; whether sufficient evidence or proof of the employee's guilt of the offense is established; whether progressive discipline was followed, or not applicable under the circumstances; whether the punishment imposed is proportionate to the offense; whether the employee's employment record, including years of service, performance, and disciplinary record, have been given due consideration; and whether there are other mitigating circumstances which would justify a lesser penalty.

Hoffmann and State of Iowa (Department of Transportation), 93-MA-21 at 22.

In determining whether just cause exists PERB has continued to examine the totality of circumstances in each case. *See, e.g., Cooper and State of Iowa (Department of Human Rights)*, 97-MA-12 at 29. As previously stated by the Board,

> [W]e believe that a § 19A.14(2)[now § 8A.415(2)] just cause determination requires an analysis of all the relevant circumstances concerning the conduct which precipitated the disciplinary action, and need not depend upon a mechanical, inflexible application of fixed "elements" which may or may not have any real applicability to the case under consideration.

Hunsaker and State of Iowa (Department of Employment Services), 90-MA-13 at 40.

Brooks was terminated under the EEO/AA/AD policy and IWD work rules that prohibit disability discrimination and require the employer to provide reasonable accommodations when requested. There is no question that Brooks was aware of the employer's policy and work rule cited in the termination letter. The dispute between the parties is whether Brooks' actions were in violation of the EEO/AA/AD policy or cited work rule.

Brooks' termination letter did not detail any specific conduct which formed the basis of IWD's conclusion that Brooks discriminated against an employee. But a review of the DAS investigative report, its third-step response, and the State's arguments made before the ALJ reveal that IWD terminated Brooks because it determined his refusal to provide IV with an office space and computer monitors that fit her needs amounted to discrimination within the meaning of the EEO/AA/AD policy and cited IWD work rule.

The State argues Brooks' discriminatory intent is evidenced by his "bullshit" comment and that he would not have hired IV if he knew she would displace a more senior employee from an office space. It argues Brooks demonstrated a resistance to IV's accommodations, repeatedly ignored management's unequivocal directives to implement the accommodations, and delayed the implementation to the extent that upper management had to step in to accommodate IV with an office and computer monitors. The State argues Brooks' continued refusal to implement the said accommodations adversely impacted IV's training in violation of the EEO/AA/AD policy.

Refusal to Implement IV's Office Accommodation

The State argues Brooks was repeatedly directed to move IV into an office, first by the Ergo Report itself and then by his supervisors, Landess and Reha. Despite these multiple directives, the State argues Brooks still refused to provide

IV with an office and Landess ultimately had to implement that accommodation himself.

Although the State labels the Ergo Report as a "directive," the record instead indicates it is a set of recommendations, not a directive. DeHeer informed IV the report contained her recommendations but the next step of the process was to wait for a response from management. As such, the position that the Ergo Report possessed equal authority as a directive is unsupported by the record.

The Ergo Report did, however, inform Brooks for the first time on January 15 that IV needed a work space where she could modify the lighting as needed. While other options were discussed, such as raising cubicle walls or turning off the light above her cubicle, DeHeer ultimately concluded those were not viable options because it would affect other staff or violate OSHA standards. For those reasons, DeHeer recommended that IV be placed in an office with hard walls and a door.

The State's argument relies primarily on Landess' January 21 conversation with Brooks but entirely disregards the subsequent discussion Landess and Brooks had about the timing of IV's move to an office. Brooks acknowledged Landess instructed him to identify which employee will be removed from an office and to implement IV's office accommodation, but also indicated this was not the final discussion they had regarding IV's office accommodation. During the "work directive" meeting, Brooks informed Landess which employee would vacate his

office and specifically asked Landess how much time he had to move IV to an office. When Landess responded the accommodation needed to be in place "prior to any kind of work expectation" being placed on IV, they talked about coordinating IV's office move during the upcoming phone installation to avoid a double charge from vendor. Brooks explained that IV was still in training and would not have any case assignments until she completed her training. The record indicates Landess agreed that delaying IV's move to an office would be acceptable because she was still in training and had no case assignments. Landess then indicated he would find out the phone installation schedule.

Following his discussion with Landess, Brooks did not move IV to an office and Landess did not discuss IV's office move with Brooks again. Brooks also relayed to Andrews, on January 26, his understanding that he did not have to move IV until she was done with training, which Andrews then communicated to Landess that same day. The record does not indicate that Landess ever disagreed with Brooks' understanding of their timing discussion or that he subsequently informed Brooks his understanding regarding the timing of IV's move was inaccurate.

The State highlights Brooks' statements that he would assess how IV does in the cubicle with the technology accommodations as evidence of his continued resistance to her office accommodation. While those statements are well supported by the record, as is Brooks' hope that the technology accommodations would

sufficiently accommodate IV's needs so that she would not need an office, they are not the reason Brooks did not move IV to an office. Instead, the record presented indicated, he did not implement her office accommodation because he was acting in accordance with the timing discussion he had with his supervisor.

When the transferring employee volunteered to vacate her office, Landess reassessed his previous position on the timing of IV's move for several reasons. He found out the phone installation would not be completed for several months and also inaccurately concluded IV had case assignments. He further discussed IV's office accommodation with other individuals, including Andrews whose job is to ensure ADA compliance. All of this led to Landess' decision that they should no longer delay IV's move to an office. However, none of this information or reasoning was ever communicated to Brooks.

As previously outlined, a just cause determination requires a consideration of all the relevant circumstances which precipitated the disciplinary action, and in this appeal, the timing discussion that Brooks had with Landess is a relevant event. From when they discussed the timing of IV's office accommodation on or about January 25 to when he left for vacation on February 5, the direction Brooks was given by his supervisor was that delaying IV's move was acceptable while she was in training and did not have any case assignments. For this reason, Brooks had no notice that his failure to move IV to an office would be interpreted as a

refusal to implement an accommodation, and consequently, deemed a violation of the EEO/AA/AD policy or the cited IWD work rule.

Refusal to Provide IV with Recommended Computer Monitors

The State argues the Ergo Report directed Brooks to provide IV with a specific computer monitor but Brooks refused to provide her with monitors that met IV's visual needs. For the reasons previously discussed, the record does not support the State's positon that the Ergo Report is a directive itself. The Ergo Report did, however, inform Brooks that IV needs square shaped computer monitors due to her visual impairment and that the specific monitor model (HP LP2065) she was currently using worked well for her.

The record demonstrates Brooks provided IV with square shaped monitors on her first day with IWD. Although the monitors were not the HP LP 2065 model referenced in the Ergo Report, they were consistent with the recommendations because they were square shaped monitors. Additionally, at the time he set them up for her, IV did not inform Brooks the provided monitors would not meet her needs. The record also indicates Brooks worked to resolve the dual monitor connectivity issue and ultimately fixed the issue by installing a new cable on February 16.

Until February 17, Brooks had no indication the provided monitors would not meet IV's needs once the dual monitor issue was resolved. However, on that date, IV asked to order the HP LP2065 monitor because it had the capability to set

one monitor to portrait and the other to landscape orientation, a setup that helped her easily see all parts of documents on her screen. Brooks checked the HP website that same day to find the specific HP LP2065 model referenced in the Ergo Report but did not find it as an available model and informed IV of such. He asked her to search the Dell and HP websites to find another monitor to fit her needs and that he would contact IT to find out the current models the State had under contact. Brooks was subsequently placed on paid administrative leave on February 19, and the record does not reveal any other communications he exchanged pertaining to the monitors.

Under the facts presented in the record before me, Brooks' failure to acquire the HP LP2065 monitor does not amount to a refusal to accommodate IV in that respect because, until February 17, Brooks had no indication the provided monitors would not meet IV's needs once the dual monitors connectivity issue was resolved. He certainly could have ordered the HP LP2065 model prior to her start date, but as he told Moen at that time, Brooks thought he found square monitors that would fit IV's visual needs. Since he had no indication until February 17 that the provided monitors would not fit her needs, Brooks had no accommodation-related reason to purchase the specific HP LP2065 model.

As the record demonstrates, IV was provided with square monitors, which was consistent with the needs articulated in the Ergo Report. Setting aside the connectivity issue that was resolved, IV always had a functional square shaped

monitor. Additionally, when Brooks became aware of the second issue about orientation of the two monitors, he sought to find a model that allowed those capabilities because the specific one she asked for was no longer available for purchase. The State has not presented evidence that Brooks failed to provide IV with monitors that fit her needs and, as such, the State has failed to demonstrate that Brooks refused to provide IV with this accommodation in violation of the EEO/AA/AD policy or the IWD work rules.

IV's Training was "Adversely Affected"

In its investigative findings, DAS concluded that IV's "training was adversely affected due to Brooks' failure to move [IV] into an office and to timely address the issues with her square monitors." After reviewing the evidence presented, I do not find that the record supports this conclusion.

During her February 5 interview with DAS, IV described that her training was "half-there" because she still did not have access to "PJCase," which prevented her from being able to access the database from her own work station after shadowing her co-workers. The record indicates Brooks informed IV, on February 2, that he had requested her access to "PJCase" but the approval process took time since it involves IWD steps of approval and DHS. More importantly to this appeal, however, IV's training was not "adversely affected" for the reasons that Brooks was terminated, *i.e.* not moving her to an office and not providing her with the HP LP2065 computer monitors.

Having considered the entirety of the record and the arguments raised by the parties, the State (IWD) did not have just cause within the meaning of Iowa Code section 8A.415(2) to terminate Brooks' employment. I consequently propose the following:

ORDER

Iowa Workforce Development shall reinstate Doug Brooks to his former position as a Workforce Development Manager in the Promise Jobs program (if the position still exists, and if not, to a substantially equivalent position), with back pay and benefits, less interim earnings; restore his benefit accounts to reflect accumulations he would have received but for his discharge; make appropriate adjustments to his personnel records and take all other actions necessary to restore him to the position he would have been in had he not been discharged.

This proposed decision and order will become PERB's final agency action of the merits of Brooks' appeal pursuant to PERB rule 621—9.1 unless, within 20 days of the date below, a party files an appeal to the Public Employment Relations Board or the Board determines to review the proposed decision on its own motion.

The ALJ retains jurisdiction of this matter in order to address any remedy-related matters which might arise and to specify the precise terms of the remedy. In order to prevent further delay in the resolution of this matter, a hearing to receive evidence and arguments on the precise terms of the remedy, should the parties fail to reach agreement, will be scheduled and held within 45 days of the

date of this proposed decision becomes PERB's final action on the merits of Brooks' appeal.

DATED at Des Moines, Iowa, this 29th day of December, 2017.

/s/Jasmina Sarajlija
Administrative Law Judge

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